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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. ~~73~~ 1158

WILLARD H. FLEMING,

Petitioner,

vs.

THE STATE PERSONNEL BOARD, and GEORGE HOPFENBECK, LAIRD CAMPBELL, FRED VIERRA, DOROTHY A. MCRAE, and JACK DE VIVIER, Board Members

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Colorado Supreme Court entered in this matter on October 9, 1973. Petition for rehearing was denied on October 29, 1973.

Opinions Below

The October 9, 1973, opinion of the Colorado Supreme Court, whose judgment is herein sought to be reviewed, the opinion of the Colorado Court of Appeals, the order of the District Court and the order refusing reinstatement by the State Civil Service Commission are all printed in the Appendix hereto. Only the opinion of the Court of Appeals has been reported, and appears at 31 Colo. App. 463, 506 P. 2d 158.

Jurisdiction

The judgment of the Colorado Supreme Court was entered October 9, 1973, and Petition for Rehearing was denied on October 29, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

Constitutional and Statutory Provisions Involved

This case involves the following constitutional provisions, Presidential Proclamations, Executive Orders, and statutes:

1. Article II, Sections One and Two of the United States Constitution, which provide in pertinent part:

> "The executive power shall be vested in a president of the United States of America."
> "The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States."

2. Presidential Proclamation No. 2914, issued December 16, 1950, 64 Stat. A454 (3 C.F.R. 99, 1949-1953 Comp.) which in part provides:*

> "NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency . . ."

3. Presidential Executive Order No. 10585, 20 F.R. 17 issued January 4, 1955 which provides:

> By virtue of the authority vested in me by section 112(c) (3) of the Internal Revenue Code of 1954, January 31, 1955, as of midnight thereof, is hereby designated as the date of termination of combatant activities in the zone comprised of the

*(the full text thereof is printed in the Appendix hereto).

area described in Executive Order No. 10195 of December 20, 1950 (15 F.R. 9177).

4. C.R.S. 1963, 94-1-35, which provides:

"Public employees — emergency military leave. — Subject to the conditions hereinafter prescribed, any officer or employee of the state or of any political subdivision, municipal corporation, or other public agency of the state, who engages in active military service in time of war or other emergency declared by proper authority of the state or the United States, for which leave is not otherwise allowed by law, shall be entitled to leave of absence from his public office or employment without pay during such service with right of reinstatement as hereinafter provided."

Question Presented

Whether the Court erred in holding that the Executive Order of January 4, 1955, ending Korean combat activities, declared that the state of national emergency proclaimed in the Presidential Proclamation of December 16, 1950, no longer actually exists.

Statement of the Case

This litigation was commenced when Petitioner was denied reinstatement by the Colorado Civil Service Commission following his release from military service. Pursuant to the Presidential declaration of national emergency, Petitioner was called to active duty as a member of the United States Air Force Reserve on March 6, 1951, for an indefinite period after having served in state civil service employment for approximately twelve years. The powers, duties, and functions of the Civil Service Commission are now

vested in Respondent Board, and suits commenced against the Commission may be continued against the Board and its members. C.R.S. 1963, 26-1-38.

Petitioner was released from active duty in July of 1967, and applied for reinstatement pursuant to the statute on September 11, 1967. The Civil Service Commission denied his application on the basis that the cessation of combat activities in Korea terminated the national emergency proclaimed by the President on December 16, 1950. The District Court reversed the Commission, and on appeal the Colorado Court of Appeals affirmed, holding that the state of emergency proclaimed, not having been terminated, still existed. The Colorado Supreme Court reversed the Court of Appeals on the basis that the Executive Order ending Korean combat terminated the Presidential proclamation of national emergency, and since that date no actual national emergency exists.

Throughout the entire period of Petitioner's military service the state of national emergency proclaimed in 1950 has existed. During this period, Petitioner made contributions to the Colorado Public Employees' Retirement Association, which contributions were retained. Throughout this period, the official Civil Service Commission employment record showed him to be on indefinite military leave without pay. No changes in his status were made as a result of the 1955 Executive Order, and it was not until January of 1967 that Petitioner was ever advised by Respondents, and then without a hearing, that such order had any effect on his statutory right to reinstatement.

The federal question sought to be reviewed was raised initially by Petitioner before the Civil Service Commission, and in the pleadings before the trial court, and by the Respondents before the Court of Appeals and Supreme Court

by way of certiorari. The Commission ruled that the state of emergency was terminated, the District Court and Court of Appeals held that it was still in effect, and the Colorado Supreme Court ruled that the national emergency still technically exists but does not actually exist because of the announced cessation of combat activities in Korea.

Reasons for Granting the Writ

The Colorado Supreme Court has determined a federal question of substance in a way probably not in accord with decisions of this Court, and in a way definitely not in accord with numerous Circuit Court decisions on the question. The effect of the decision is to deprive Petitioner, a veteran of the armed forces, who was possessed of vested Civil Service rights, of his right to reinstatement of his employment, on the clearly erroneous basis that the state of emergency proclaimed by President Truman is no longer in existence.

The effect of the decision has devastated Petitioner, and has the potential effect of allowing state courts in each of the fifty states to substitute their judgment for the duly executed authority of the President on matters which, under the Constitution, are exclusively within his province.

There does not seem to be a single Supreme Court or Circuit Court case in which the proclaimed state of emergency has been held terminated for any reason, including the Executive Order ending Korean combat, or even that the emergency therein described was limited to Korea. Recent decisions have uniformly held that the state of emergency does exist, and shall only cease when so declared by proper authority.

In *U.S. vs. Laub*, 385 U.S. 475, 17 L.Ed. 2d 526 (1967) this Court recognized that the declaration of emergency was then in effect. In *United States v. Achtenburg*, 459 F.2d 91 (8th Cir. 1972) the Court said, at p. 94:

> "The state of emergency proclaimed by the President on December 16, 1950, has not been terminated either by the President or by concurrent resolution of Congress. See Sardino v. Federal Reserve Bank of New York, 2 Cir., 361 F.2d 106, 109."

Also clearly stating that the United States has been in a continuous state of emergency under the 1950 proclamation are the cases of *Nielsen v. Secretary of Treasury*, 424 F.2d 833 (D.C. Cir. 1970); *Teague v. Regional Commissioner of Customs, Region II*, 404 F.2d 441 (2d Cir. 1968); and *Jolley v. Immigration and Naturalization Service*, 441 F.2d 1245 (5th Cir. 1971).

The law with regard to the status of the 1950 Proclamation was correctly stated at p. 443 of the *Teague* decision, *supra:*

> "In December 1950 President Truman proclaimed the existence of a national emergency, 64 Stat. A 454 (1950). That proclamation has never been revoked. Although the proclamation took particular note of 'recent events in Korea and elsewhere', it also made general reference to 'the increasing menace of the forces of communist aggression'.
>
> As this Court Said In Sardino v. Federal Reserve Bank, 361 F.2d 106, 109-110 (2d Cir.), cert. denied, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed. 2d 130 (1966):
>
> 'The declaration has never been revoked; rather it has been repeatedly and recently reaffirmed. * * *

> While the courts will not review a determination as peculiarly within the province of the chief executive, there can hardly be doubt as to the existence of an emergency today when thousands of United States troops are in action and many more are in readiness around the globe.' "

Here, the Colorado Supreme Court has declared that there is no state of emergency as proclaimed. The effect of the decision is to erode the executive powers of the President, who, under the United States Constitution, is the nation's chief executive officer and commander-in-chief. If this decision is not reversed, the rights of veterans from all over the United States could be threatened.

Indeed, Executive Order No. 10585 of January 4, 1955, 20 F.R. 17, terminating combat activities refers to Executive Order No. 10195, dated December 22, 1950, 15 F.R. 9177, which is entitled: "Designation of Korea and Waters Adjacent Thereto as a Combat Zone for the Purposes of Section 22(b) (13) of the Internal Revenue Code". It is apparent that the only purposes of the orders relating to Korean combat were for taxation purposes, and that the 1955 order did not affect in any way the existence of the state of emergency proclaimed by the President.

The character of military pay as "combat pay" in various areas of the world for purposes of the Internal Revenue Code can have no bearing on the question of the efficacy of an unrevoked Presidential proclamation of national emergency. For example, executive order No. 11216, 30 F.R. 5817, dated April 27, 1965, declared Vietnam and adjacent waters as a combat area for tax purposes.

We respectfully submit that the Colorado Supreme Court has clearly ignored the effect of the Presidential proclama-

tion declaring a national emergency which still exists. The obvious effect of the decision is to deprive Petitioner of vested property rights. If this decision is permitted to stand, then similar rights of untold numbers of American veterans in every state of the Union could likewise be lost.

Conclusion

Wherefore, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

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No. 2914

Dec. 19, 1950, 15 F.R. 9029

PROCLAIMING THE EXISTENCE OF A NATIONAL EMERGENCY

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the exis-

tence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace.

I summon all citizens to make a united effort for the security and well-being of our beloved country and to place its needs foremost in thought and action that the full moral and material strength of the Nation may be readied for the dangers which threaten us.

I summon our farmers, our workers in industry, and our businessmen to make a mighty production effort to meet the defense requirements of the Nation and to this end to eliminate all waste and inefficiency and to subordinate all lesser interests to the common good.

I summon every person and every community to make, with a spirit of neighborliness, whatever sacrifices are necessary for the welfare of the Nation.

I summon all State and local leaders and officials to cooperate fully with the military and civilian defense agencies of the United States in the national defense program.

I summon all citizens to be loyal to the principles upon which our Nation is founded, to keep faith with our friends and allies, and to be firm in our devotion to the peaceful purposes for which the United Nations was founded.

I am confident that we will meet the dangers that confront us with courage and determination, strong in the faith that we can thereby "secure the Blessings of Liberty to ourselves and our Posterity."

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 16th day of December (10:20 a.m.) in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

[SEAL]

HARRY S. TRUMAN

By the President:
DEAN ACHESON,
Secretary of State.

A-4

BEFORE THE CIVIL SERVICE COMMISSION OF THE STATE OF COLORADO

WILLARD H. FLEMING vs. COLORADO STATE CIVIL SERVICE COMMISSION	Order Refusing Reinstatement

The Colorado State Civil Service Commission, having reviewed all of the evidence and considering the testimony in the matter of the petition of Willard H. Fleming for reinstatement, hereby finds and rules as follows:

1. That Willard H. Fleming was a certified employee of the State of Colorado, employed by the Department of Revenue;

2. That on April 18, 1951, Mr. Fleming was granted military leave without pay for an indefinite period for the Korean emergency under the provisions of the Civil Service Commission Rules and Regulations of March 1, 1949 — then in effect;

3. That the Korean emergency was officially and legally terminated on January 1, 1955, and that Mr. Fleming's military leave was terminated one year thereafter — on January 1, 1956;

4. That Mr. Willard T. Fleming did, of his own free will, voluntarily agree to remain on active duty for an indefinite period on 30 July, 1952, at which time he could have requested a release from the military service, and knowing full well that he could submit in writing a desire for release and obtain same within 21 months, did remain thereafter, under the United States Air Force Rules and Regulations;

5. That even though he did not request a release in 1952, he could have requested such a release at the termination of the Korean emergency and returned to state service within one year thereafter, but this he failed to do.

6. Inasmuch as Mr. Fleming did not return to state service within one year after the termination of the Korean emergency, his military leave without pay was terminated and he was deemed to have resigned, effective January 31, 1956.

Therefore, and because of the above, the petition for reinstatement of Willard H. Fleming is hereby denied.

Signed this Eighth day of January, 1969.

STATE CIVIL SERVICE COMMISSION

_____

Cy J. Burress, Jr., President

IN THE DISTRICT COURT IN AND FOR THE
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. C-9697

Division 6

WILLARD H. FLEMING,
Plaintiff,

vs.

STATE CIVIL SERVICE COMMISSION OF COLORADO, and CY J. BURRESS, JR., WM., H. WELSH, JR., and H. Y. BATTERTON, Commission Members,
Defendants.

Judgment and Decree

This cause coming on to be heard on March 5, 1971 in Open Court, without a jury, pursuant to the provisions of 3-16-5 Colorado Revised Statutes, as amended, and Rule 106 (4) of Colorado Rules of Civil Procedure to review the transcript of testimony and exhibits attached thereto of a hearing held before the Defendant Commission on September 11 and 12, 1968, and upon the issues drawn by the pleadings filed herein, the Plaintiff being represented by attorneys Gail L. Ireland and Faith M. Olsen, and the Defendants being represented by Duke W. Dunbar, Attorney General of the State of Colorado, by Robert L. Hoecker, Assistant Attorney General, and the Court having read the said transcript and examined said exhibits as well as all pleadings filed, and having heard the arguments of counsel and being fully advised in the premises,

DOTH FIND:

1. That the Plaintiff, a Major in the Air Force Reserve on and prior to March 6, 1951, was directed by Special Orders No. 65 of such date (Commission's Exhibit C-23, transcript) to report at Lowry Field for active military service, effective March 9, 1951 for an indefinite period, which he did; that said order closely followed the issuance of a Presidential Proclamation No. 2914, dated December 16, 1950, by President Truman, proclaiming the existence of a National Emergency which required that the military, naval, air and civilian defenses of the United States be strengthened as speedily as possible; That Plaintiff delivered said order and his written request for indefinite military leave to the Defendant Commission and said Commission on April 18, 1951 granted Plaintiff indefinite military leave without pay, as appears from the Commission's official records. Plaintiff was released from active duty on June 30, 1967.

2. That the testimony and evidence as shown by the transcript is clear that Plaintiff came to the Defendant Commission's office from 1954 to 1963 at least once each year except during 1958 and inquired as to his civil service standing and was each time informed by one or more of the members of the Defendant Commission or by a member of the office staff that the Commission's records showed him to be in good standing as a certified civil service employee on military leave.

3. That from the transcript and exhibits attached thereto it is also clear that he had from time to time advised the Commission of his intention to return to his state position as soon as he was relieved from military duty.

4. That the Defendant Commission's official record shows that said Commission on January 11, 1967 advised

Plaintiff, while he was still in active service, that he had lost his right of reinstatement as a certified civil service employee.

5. That the Defendant Commission on September 11, 1968, held a hearing according to law and the rules and regulations of Defendant Commission, the latter raising the issue as evidenced by its Statement of Position (Commission's Exhibit 71, Transcript) that Plaintiff was granted indefinite military leave for the Korean emergency and that such Korean emergency terminated January 31, 1955 and that Plaintiff did not return to state service within one year thereafter or by January 31, 1956, all of which the Plaintiff denied.

6. That the Defendants have failed to show that Plaintiff's military leave of absence was limited to any such period of emergency or military activity in Korea.

7. That Plaintiff had no obligation under the circumstances and as shown by the transcript and exhibits to request a release or to try to escape his military duty prior to the time that he did advise the Defendant Commission by letter dated September 8, 1967, (Commission's Exhibit No. 17, transcript — Exhibit H in Complaint), that he was available to resume his state service.

8. That the Defendant Commission failed to notify Plaintiff in any manner that it intended to drop or remove him as a certified civil service employee until shortly before he was ready to report for state duty as aforesaid, but that the Defendant Commission on the contrary lead Plaintiff to believe that he was on safe ground and that his position would be available to him when he returned.

9. That Plaintiff should have been reinstated to his posi-

tion at the time he notified the Defendant Commission that he was available in his said letter dated September 8, 1967.

10. That the Defendant Commission exceeded its jurisdiction and abused its discretion in refusing by its order dated January 8, 1969 to reinstate Plaintiff, in that it ignored the Civil Service Provisions of the State Constitution, the statutes of the State of Colorado, as well as its own Rules and Regulations.

11. Without considering whether 94-1-35 and 94-1-36, C.R.S. 1963, and President Truman's Proclamation No. 2914 dated December 16, 1950 (defendant Commission's Exhibit C-23) are pertinent to the facts and issues in this case, the evidence as shown by the Transcript is insufficient to support the position taken by defendant Commission in its Statement of Position (defendant Commission's Exhibit 71 in the Transcript and Exhibit K attached to plaintiff's Complaint) wherein defendant Commission stated that plaintiff was granted military leave without pay for an indefinite period for the Korean emergency, which terminated January 31, 1955 and requiring Plaintiff to return to state service before January 31, 1956 and that Plaintiff was deemed to have resigned effective January 31, 1956.

12. That the refusal of said Defendant Commission to reinstate Plaintiff was also contrary to the law and the evidence and the Findings of Fact by said Defendant Commission are unsupported on the entire record as shown by the transcript and exhibits, but that such record and exhibits supported Plaintiff's position that he had the right to be reinstated to his position or one of like seniority, status and pay, as provided by the Colorado statutes pertinent thereto.

THE COURT THEREFORE CONCLUDES as a matter of law that the Defendant Commission erred in refusing

to reinstate Plaintiff to his position or one of like seniority, status and pay and that Defendant Commission must reinstate Plaintiff forthwith and that he is entitled to be compensated for salary denied him from September 8, 1967, the date of his said letter to the Defendant Commission, until he is reinstated by Defendant Commission in a public position of like seniority, status and pay, if such is available, at the same salary he would have received if he had not taken such leave.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said Order of Defendant Commission refusing reinstatement be vacated and held for naught; that the Defendant Commission forthwith reinstate Plaintiff as provided and required by statute and the Rules and Regulations of Defendant Commission consistent with the laws of the State of Colorado in such case made and provided, and that this case be and is hereby remanded back to the Defendant Commission or its successor for the purpose of taking whatever pertinent testimony and evidence the parties wish to present concerning plaintiff's entitlement to back pay, and to determine and adjudge the amount, if any, due Plaintiff from September 8, 1967 to the date that a position in certified state service is made available to him as provided by the statutes and rules and regulations of Defendant Commission in such case made and provided.

Defendants shall have thirty days from the date hereof within which to file a Notice of Appeal.

Done and Signed August 26, 1971.

BY THE COURT:

/s/ M. T. Hancock
Acting under Appointment
as District Judge

COLORADO COURT OF APPEALS

No. 71-438

WILLARD H. FLEMING,
Plaintiff-Appellee,

vs.

STATE CIVIL SERVICE COMMISSION OF COLORADO, and CY J. BURRESS, JR., WM., H. WELSH, JR., and R. Y. BATTERTON, COMMISSION MEMBERS,
Defendants-Appellants.

Appeal from the District Court of the City and County of Denver

Hon. Manlius T. Hancock, Judge

DIV. II

JUDGMENT AFFIRMED

Dwyer, Enoch and Pierce, JJ.

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Opinion by JUDGE DWYER

(SEAL)

Willard H. Fleming, after his release from active duty with the armed forces, sought reinstatement to his former position in the classified service of the State of Colorado. The State Civil Service Commission of Colorado (Commission) after a hearing denied Fleming's request for reinstatement. Fleming then commenced the present action, and, after a review of the record, the court entered judgment ordering the Commission to reinstate Fleming. The court also remanded the cause to the Commission for a determination of the amount of back pay, if any, to which Fleming was entitled. The Commission has appealed. The judgment of the trial court is correct, and it is affirmed.

On July 1, 1947, Fleming was employed by the Department of Revenue of the State of Colorado. During the period of his employment, Fleming, who had served in World War II, was in the air force reserve. On March 6, 1951, Fleming was ordered to report for active military service effective March 9, 1951, for an indefinite period. On April 18, 1951, the Commission granted Fleming indefinite military leave without pay. Fleming served continuously in the armed forces until he was relieved from duty June 30, 1967.

Fleming's service in the armed forces was "voluntary" in that he could have requested and obtained his release any time after July 30, 1952. The leave which the Commission granted Fleming was designated as "indefinite military leave," and the Commission's records reflected Fleming's status as "on indefinite military leave" continuously until Fleming notified the Commission of his desire for reinstatement.

During the period of his military service, Fleming periodically discussed his status with employees of the Commission and was told that the official personnel records showed

that he was on indefinite military leave. Fleming also made contributions to the State Public Employees Retirement Association while he was on leave.

The Commission's denial of reinstatement was based upon its findings that: (1) Fleming was granted military leave without pay for an indefinite period for the Korean emergency; (2) the Korean emergency was officially and legally terminated on January 31, 1955; and, (3) Fleming did not return to state service within one year after the termination of the Korean emergency. On the basis of these findings, the Commission concluded that Fleming's military leave was terminated, and he was deemed to have resigned, effective January 31, 1956, and was not entitled to reinstatement.

The decision of the Commission was in error because it deprived Fleming of his statutory right to reinstatement under the provisions of C.R.S. 1963, 94-1-35. This statute provides:

> "'Subject to the conditions hereinafter prescribed any officer or employee of the state . . . who engages in active military service in time of war or other emergency declared by proper authority of the state or the United States, for which leave is not otherwise allowed by law, shall be entitled to leave of absence from his public office or employment without pay during such service with right of reinstatement as hereinafter provided."

On December 16, 1950, President Truman issued Presidential Proclamation No. 2914 declaring a national emergency because of events in Korea. Shortly thereafter, Fleming was called to active duty, and the Commission granted him indefinite military leave. Fleming remained on active

duty until July 30, 1967. Prior to completing his military service, Fleming notified the Commission that he intended to return to his state job, and, shortly after his release from military service, he notified the Commission that he was available for employment.

Fleming was entitled to reinstatement if his active military service was "in time of war or other emergency declared by proper authority. . . ." His service after April 28, 1952, was not in time of war because World War II terminated on that date by operation of the treaty of peace with Japan and Presidential Proclamation No. 2974. Fleming's service was, however, in time of the "emergency" which was declared in Presidential Proclamation No. 2914.

The Commission takes the position that the national emergency declared in Presidential Proclamation No. 2914 was terminated by Executive Order No. 10585 issued January 1, 1955. This Order fixed January 31, 1955, as the date of termination of combat activities in Korea. The Commission's construction of Executive Order No. 10585 is erroneous. Termination of combat activities does not terminate a national emergency. In *Pyramid Life Insurance Co. v. Masch,* 134 Colo. 70, 299 P.2d 117, the court stated:

> "The existence or nonexistence of a state of war is a political, not a judicial, question and it is only when a formal declaration of war had been made by the Congress that judicial cognizance may be taken thereof. Once so declared by the political department, it becomes binding upon the courts, otherwise not."

The rule stated in *Pyramid* applies to the existence or nonexistence of a national emergency as well as to the existence or nonexistence of a state of war. The existence of a

national emergency is not a judicial question. Under the provisions of C.R.S. 1963, 94-1-35, a national emergency is one "declared by proper authority of the state or the United States. . . ." An emergency once "declared by proper authority" continues until terminated by proper authority, and the courts can neither declare the existence of, nor the termination of, a national emergency. An examination of recent federal court cases demonstrates that the national emergency declared December 16, 1950, had not been terminated when Fleming was released from active duty and applied for reinstatement to his state job. In *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130, the court stated:

> "On December 16, 1950, President Truman, taking particular note of 'recent events in Korea and elsewhere' but also making general reference to 'the increasing menace of the forces of communist aggression,' proclaimed the existence of a national emergency. 64 Stat. A454. The declaration has never been revoked; rather it has been repeatedly and recently reaffirmed. Exec. Order No. 10896 25 F.R. 12281 (1960); Exec. Order No. 10905, 26 F.R. 321 (1961); Exec. Order No. 11037, 27 F.R. 6967 (1962)."

Similarly, in *United States v. Achtenberg*, 459 F.2d 91 (8th Cir. 1972), a case concerned with the viability of the Sabotage Act, the court stated:

> "The state of emergency proclaimed by the President on December 16, 1950 has not been terminated either by the president or concurrent resolution of Congress. *See Sardino v. Federal Re-*

> *serve Bank,* [*supra*]. In our view the statute contemplates a termination of an emergency only by act of president or by concurrent resolution of Congress. No Presidential proclamation or Congressional concurrent resolution has been enacted to terminate the emergency."

Accord, Teague v. Regional Commissioner of Customs, 404 F.2d 441 (2d Cir. 1968), *cert. denied,* 394 U.S. 977, 89 S.Ct. 1457, 22 L.Ed.2d 756; and *Nielsen v. Secretary of Treasury,* 424 F.2d 833 (D.C. Cir. 1970).

Thus, Fleming's military service was in time of a national emergency, and he is entitled to reinstatement under the express provisions of C.R.S. 1963, 94-1-35.

The decision of our Supreme Court in *Dies v. City and County of Denver,* —— Colo. ——, 483 P.2d 378, is not in conflict with our holding that the national emergency declared in Presidential Proclamation No. 2914 was not terminated by the Executive Order of January 1, 1955, terminating combat activities in Korea. In that case, neither the termination date of the national emergency nor the legal effect of the Executive Order of January 1, 1955, terminating combat activities was an issue.

The Commission argues that the statutory right to reinstatement contained in C.R.S. 1963, 94-1-35, is not available to Fleming because the statute was enacted in 1955. The Commission argues that the statute has no retroactive effect. This argument is rejected. The statute, by its terms, applies to employees of the state who engage in active military service in time of war or other emergency, and it applies to employees who were so engaged as of the effective date of the statute, as well as those who became so engaged after its effective date.

The Commission also contends that it is contrary to public policy to permit Fleming to pursue a military career until retirement and then be reinstated to state service. Fleming claims a right to reinstatement under a statute enacted by the General Assembly. It is the duty of the courts to enforce the statute as written. The public policy of this state as manifested by statute is to permit a public employee who is engaged in active military service to be reinstated to his former position upon completion of such service under the terms and conditions specified in the statutes. C.R.S. 1963, 94-1-36. Courts and administrative agencies are not at liberty to substitute their own notions of public policy for the public policy of the state as declared by the legislature.

Since Fleming is entitled to reinstatement under C.R.S. 1963, 94-1-35, it is unnecessary to consider his alternative contention that he is entitled to reinstatement because the leave granted him by the Commission was for an indefinite time and was not, by its terms or by necessary implication, limited to any particular war or national emergency.

Judgment affirmed.

Judge Enoch concurs.

Judge Pierce dissents.

Judge Pierce, dissenting:

While I agree wholeheartedly with the logic and legal conclusions reached by the majority, I do not agree with their interpretation of *Dies v. City and County of Denver*, —— Colo. ——, 483 P.2d 378, in which I believe the Colorado Supreme Court ruled that the Korean conflict terminated and the national emergency was declared to be at an end in 1955.

NO. C-330

STATE CIVIL SERVICE COMMISSION OF COLORADO, and CY J. BURRESS, JR., WM., H. WELSH, JR., and R. Y. BATTERTON, Commission Members,
Petitioners,

vs.

WILLARD H. FLEMING,
Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

John P. Moore, Attorney General,
John E. Bush, Deputy Attorney General,
Robert L. Hoecker, Assistant Attorney General,

Attorneys for Petitioners.

Gail L. Ireland,
Faith M. Olsen,

Attorneys for Respondent.

MR. JUSTICE HODGES delivered the Opinion of the Court.

Certiorari was granted to review the decision of the Colorado Court of Appeals in *Fleming v. State Civil Service Commission of Colorado,* 31 Colo. App. 463, 506 P.2d 158. In that case, the Court of Appeals held that respondent

Fleming has a statutory right under C.R.S. 1963, 94-1-35 to reinstatement as a state civil service employee after 16 years in military service. We reverse the judgment of that case, and hold that a correct interpretation of this statute precludes the reinstatement of this respondent.

The facts which are pertinent in the resolution of the issue involved are set forth as follows. On July 1, 1947, respondent Fleming became a civil service employee in the Department of Revenue of the State of Colorado. He was a member of the Air Force Reserve, and in connection with the Korean emergency, was ordered to report for active military service effective March 9, 1951 for an indefinite period. He was granted indefinite military leave without pay from his state employment. By executive order of the President of the United States, combat activities in Korea were terminated as of January 31, 1955. The record reveals, and the Court of Appeals' opinion states, that Fleming's continued service in the armed forces was "voluntary" in that he could have requested and obtained his release anytime after July 30, 1952. Nevertheless, he continued to serve in the military forces until June 30, 1967 when he retired with the rank of lieutenant colonel.

He thereupon sought reinstatement to his former position as a civil service employee of the State of Colorado. The State Civil Service Commission of Colorado (Commission) after a hearing denied Fleming's request for reinstatement. He thereupon initiated a district court action against the Commission seeking

> "An order, judgment and decree reinstating plaintiff in the position he held when he was granted military leave or to a position of like seniority, status and pay as if he had not been

> granted such leave but had remained in his position in the state service as a certified civil service employee."

Fleming's complaint also alleged that on September 8, 1967, he was entitled to be reinstated in his former position at a monthly salary of $975 and that he is therefor entitled to a judgment which will provide him with an amount equal to the salary he would receive from September 8, 1967 to the date of the entry judgment. On August 26, 1971, the district court entered a judgment in favor of Fleming and ordered the Commission to reinstate him and to hold a hearing to determine the amount of back pay to which he is entitled. It is this judgment which was affirmed by the Court of Appeals in *Fleming v. State Civil Service Commission of Colorado, supra.*

The Court of Appeals held that C.R.S. 1963, 94-1-35 gave Fleming a statutory right to reinstatement under the facts of this case. We do not agree with this interpretation. In pertinent part this statute provides:

> "Subject to the conditions hereinafter prescribed, any officer or employee of the state . . . , who engages in active military service in time of war or other emergency declared by proper authority of the state or the United States, for which leave is not otherwise allowed by law, shall be entitled to leave of absence from his public office or employment without pay *during such service* with right of reinstatement as hereinafter provided."

On December 16, 1950, President Truman issued Proclamation No. 2914 declaring a national emergency because of the events in Korea. Until the present time, there has been no presidential declaration that this national emergency has

ended and until there is such a declaration, this national emergency involving Korea, still technically exists even though the combat activities were declared terminated by the President in 1955. On this basis, the Court of Appeals' opinion holds that since this national emergency has not been declared as terminated, Fleming must be reinstated under the requirement of this statute. To the contrary, we interpret this statute to mean that a public employee who goes into active military service in time of declared war or other emergency is entitled to leave without pay status, but only so long as the war or emergency actually exists.

This statute does not specify when such entitlement to leave without pay terminates. In other words, the statute does not state that the same kind of declaration which activates its operation is required to deactivate it. However, in our view, it is implicit in this statute that its benefit is not to continue during periods when this country is not engaged in any war or other emergency which requires our military intervention. After the cessation of active combat or the condition requiring military intervention, it is clear that it was intended that this statute become non-operative.

The provisions of 1971 Perm. Supp., C.R.S. 1963, 26-2-1 and 26-2-2 are operative at all times as to state civil service employees who enter military service regardless of whether or not there exists a war or other national emergency. These provisions of law assert that reinstatement is contingent upon the employee returning to state employment within one year after the period of initial service or additional service imposed by law. These 1971 statutes do not allow any former public employee to voluntarily make a career in the military service until retirement therefrom, and then after termination of his self-chosen military career, to return to

state employment and be awarded all the rights and privileges that would have accrued if he had never left his state civilian employment.

It appears convincingly evident that these 1971 statutes are a demonstration of the statutory scheme involved in providing leave without pay status to public employees.

Although C.R.S. 1963, 94-1-35 is non-specific as to when a public employee must return to state employment, this statute must be viewed in the light of what was the obvious statutory scheme which motivated its enactment in 1955. Clearly, the legislative intent was to provide a benefit to career public employees who went into active military service on a temporary basis in time of war or other emergency declared by proper authority. Such public employees by the provisions of C.R.S. 1963, 94-1-36, must make written application for reinstatement within a period not to exceed one year and ninety days after the conclusion of their temporary military service.

Where a statute is non-specific on a point which, nevertheless, is obvious on the basis of the clear statutory scheme involved, it is proper for a court to express it. *Bell v. Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. That case involved the Motor Vehicle Safety Responsibility Act of the State of Georgia, the provisions of which required the suspension of a driver's license of any person involved in an accident who did not carry liability insurance or did not post a security bond. The Georgia Act was non-specific as to whether the liability of the licensee was also a criteria to be considered when determining whether or not the driver's license should be suspended. In *Bell,* the Supreme Court of the United States in effect held that in looking at the State of Georgia's statutory scheme, it was clear that the liability of the driver actually played a crucial role when a determi-

nation is to be made as to whether or not the driver's license shall be suspended.

In our resolution of this case, we believe it is unnecessary to discuss at length the holding of *Dies v. City and County of Denver,* 174 Colo. 217, 483 P. 2d 378 except to state that insofar as it makes any pronouncement that the national emergency involving Korea had officially ended, we disaffirm it.

The judgment of the Court of Appeals is reversed and this case is remanded for the purpose of showing a trial court affirmance of the Civil Service Commission's order denying this respondent's reinstatement as a civil service employee of the State of Colorado.

MR. JUSTICE GROVES dissents.

CLERK'S OFFICE
SUPREME COURT
STATE OF COLORADO
DENVER, 80203
October 29, 1973

CASE NO. C-330
State Civil Service
Commission of Colorado
Fleming

The Honorable John P. Moore,
Attorney General,
Mr. John E. Bush,
Deputy Attorney General,
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Gentlemen:

The following proceedings were this day had in the above numbered and titled case:

The petition for rehearing was denied.

Remittitur issued.

Yours very truly,

RICHARD D. TURELLI, Clerk.

By: Florence Walsh
Deputy Clerk.

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Supreme Court, U. S.
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FEB 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 73-1158

WILLARD H. FLEMING,

Petitioner,

vs.

THE STATE PERSONNEL BOARD, and GEORGE HOPFENBECK, LAIRD CAMPBELL, FRED VIERRA, DOROTHY A. McRAE, and JACK DeVIVIER, Board Members,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

QUESTION PRESENTED

Contrary to the position of the petitioner, it is respectfully submitted that the single question presented is:

Whether the Colorado Supreme Court erred in holding that petitioner was not entitled to reinstatement in state service pursuant to C.R.S. 1963, 94-1-35, when petitioner did not make application for reinstatement within one year and

ninety days after the conclusion of temporary military service as is required by C.R.S. 1963, 94-1-36, when petitioner was ordered to military service in 1951, when combat activities in Korea were declared terminated by the President in 1955 although the national emergency still technically exists, and when petitioner voluntarily chose to remain on active duty until he retired in 1967.

STATEMENT OF THE CASE

The petitioner's statement of the case is substantially accurate, except as he seeks on page 4 and 5 of the Petition to state a basis for the Colorado Supreme Court's decision in such fashion as to conjure up a Federal question where none exists. It is respectfully submitted that the Colorado Supreme Court did no more than interpret the words of the pertinent Colorado statute in light of the Colorado statutory scheme in the area of leave without pay for public employees.

REASONS FOR NOT GRANTING THE WRIT

A. The decision of the Colorado Supreme Court does not present a Federal question. The court simply interpreted C.R.S. 1963, 94-1-35 to mean that the emergency referred to therein contemplated an actual emergency. The court specifically recognized that the national emergency declared by President Truman in 1950 in connection with Korea has never been declared at an end and therefore technically continues to exist (Petition, A 20-21). Moreover, the court made reference to its earlier decision in *Dies v. City and County of Denver,* 174 Colo. 217, 483 P.2d 378 (1971) and disaffirmed it " . . . insofar as it makes any pronouncement that the national emergency involving Korea had officially ended . . . "(Petition, A 23).

Consequently, it is readily apparent that the Colorado

Supreme Court recognized that the national emergency still exists, both "technically" and "officially." The court then went on to hold that, despite this "technical" and "official" existence of a national emergency, the Colorado statute, in referring to "emergency military leave" for public employees during "time of war or other emergency declared . . . ", meant an actual emergency and did not contemplate that one who takes emergency military leave during an actual emergency, voluntarily remains on active duty for many years after the actual emergency ceases, making a career of the military service until retirement, would thereafter have a right to be reinstated as a civil service employee. The court then looked at the facts and found that no emergency, within the meaning of the statute, existed after the combat activities were declared terminated by the President in 1955. This is simply a question of interpretation and application of the Colorado statute. Therefore, this Court need not and should not concern itself with the correctness of that decision. Interpretation of a Colorado statute is not a Federal question. Without a Federal question, there can be no review on certiorari. U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

B. Assuming, arguendo, that there may be a Federal question buried in the Colorado Supreme Court decision, the facts of this case are so unusual that they are not likely to recur; nor does the petitioner make any showing to the contrary, though he speaks of the endangerment of "the rights of veterans from all over the United States." Patently, the Colorado Supreme Court decision does not and cannot determine veterans' rights under other state statutes or under the Universal Military Training and Service Act, 50 U.S.C. §459. Consequently, a decision by this Court as to the precise question presented, even if it be deemed a Federal question, would be of only "isolated significance." *See*

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L.Ed. 897 (1955). This being the case, even if there be a Federal question, it is not "of substance" sufficient to warrant review on certiorari. U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

C. The supposed Federal question, claimed by the petitioner to exist, has already been decided by this Court in *U.S. v. Laub,* 385 U.S. 475, 87 S. Ct. 574, 17 L.Ed. 2d 526 (1967), as the petitioner recognizes on page 5 of his petition. To the extent that the *Laub* decision applies to state statutes, the law is clear and needs no further expression at this time. It is for the individual state courts to determine whether their statutes referring to national emergency mean the emergency determined therein. If they do, the answer has been provided by this Court as to the existence of such an emergency, and no more is required of this Court. If, on the other hand, those statutes contemplate a different sort of emergency, as the Colorado Supreme Court decided here, no amount of reiteration by this Court of the existence of the *Laub* sort of emergency will affect the result as to those statutes.

CONCLUSION

WHEREFORE, the respondents respectfully pray that this honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1973

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Respondents

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Petitioner, pursuant to the rules of this court, respectfully submits his reply to the Response to the Petition for Writ of Certiorari herein.

Reasons for Granting the Writ

A. Petitioner's right to reinstatement ultimately depends upon service "... in time of war or other emergency declared by proper authority of the state or the United States. ..." C.R.S. 1963, 94-1-35.

The question of existence of emergency may only be determined by the executive branch of government. There is nothing anywhere in the Proclamation declaring the emergency which suggests that it is in "official" or "technical",

but not "actual" existence. Similarly, the statute contains no such reference or limitation. There have been periods of armed intervention subsequent to 1955 when Korean combat activities were ended, notably Viet Nam and Southeast Asia. The effect of the decision below is to declare that no emergency actually existed during that time of Petitioner's military service. This the Colorado Court is not competent to do.

The Colorado Supreme Court has no power to rob the Presidential Proclamation of effect. It has decided a substantial federal question in a manner not in accord with any of the federal decisions of which Petitioner is aware.

B. It is submitted that the rights of persons to employment are of substance, and that the Colorado Supreme Court's misjudgment of the question presented here deprives Petitioner of very substantial rights and benefits. Respondents' claim that this case can only be of "isolated significance" is refuted by the case they cite — *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L.Ed. 897 (1955), where subsequent to granting the writ of certiorari, the Iowa legislature passed a statute which "... statute bars the ultimate question presented in this case from again arising in that State." While it may not be possible to accurately predict how many persons are similarly situated, or how many could be affected by the decision, it is clear that the state of national emergency still eixsts, and that persons still serve in the armed forces.

C. Respondents' apparent position that the individual state courts have the power to go beyond the Presidential declaration of existence of emergency is not supported by the law, as clearly appears from the cases cited in the Petition herein. The declaration of a state of national emergency is a

matter for the President, and only the President, under the United States Constitution, Article II, Sections One and Two.

Conclusion

Wherefore, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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